

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: FIRED UP, INC.
DEBTOR

§ CASE NO. 14-10447-tmd
§ (Chapter 11)

OBJECTION BY THE UNITED STATES TRUSTEE
TO AMENDED PLAN (DOCKET ENTRY 543)

TO THE HONORABLE TONY M. DAVIS, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, JUDY A. ROBBINS, United States Trustee for Region 7 (“UST”), through the undersigned counsel and files this Objection to Amended Plan (“Amended Plan”), and in support thereof, respectfully shows the Court as follows:

1. On October 29, 2014, Debtor and the Unsecured Creditors Committee filed an Amended Joint Plan of Reorganization (docket entry 543).
2. Section 8.06 of the Amended Plan provides for third party releases for “Affiliates” of Debtor, the Ford Family, and FRG Capital LLC. The proposed release covers any type of action or claim. Third party releases, such as for the Ford Family and FRG Capital LLC, and for unnamed “Affiliates” of affiliates for claims that are not specifically described are overly broad. Section 1.01.82, in defining Released Parties, only specifically identifies Debtor, the Ford Family (which is defined elsewhere), and FRG Capital, LLC. Section 1141 of the Bankruptcy Code sets forth the effect of confirmation of a plan, which the Amended Plan incorporates at Section 8.05. Section 524(e) requires that “discharge of a debt of the debtor does not affect the liability of any other entity on ... such debt.” Section 524(g) provides a mechanism for seeking an injunction that may enjoin parties from action against third parties who are specifically identified and for a limited number of liabilities. The proposed language of 8.06 of the Amended Plan does not comply with the statutory requirements of § 524.

3. In the Objection to Disclosure Statement filed by MB San Antonio Brooks Limited Partnership (docket entry 520), this issue was raised with respect to non consensual releases. The UST incorporates the argument contained therein:

The Fifth Circuit Court of Appeals has held that § 524(e) “only releases the debtor, not co-liable third parties. *Bank of New York Trust Co., N.A. v. Official Unsecured Cred. Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 254 (5th Cir. 2009.) The *Pacific Lumber* Court also held that case law “broadly forecloses non-consensual non-debtor releases and permanent injunctions.” *Id.*; *see also Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031, 1069 (5th Cir. 2012).

4. Section 2.16 of the Amended Plan proposes an injunction on jointly liable third parties and a claim modification for any claim against a third party that differs from claims allowed under the Amended Plan. The Amended Plan proposes to alter the relationship between creditors and third parties. These third parties are not identified, nor are the obligations identified. While § 524 of the Bankruptcy Code voids judgments and collection actions against Debtor, third party obligations are not affected, unless specific, injunctive steps are followed and then only for limited purposes. This proposed injunction is impermissibly broad against unidentified parties for unidentified claims. While a debtor’s performance under a confirmed plan may provide injunctive type relief, the Bankruptcy Code only provides an injunction through a specific process.

5. Section 2.18, which proposes to limit the time period for a § 1111(b) election does not comply with the Bankruptcy Code requirements set forth in § 1111(b). The Amended Plan should not alter statutory rights of creditors. In addition, the notice of the proposed time period limitation was only provided after the proposed deadline had passed. This provision of the Amended Plan should be disallowed.

6. Section 5.08 sets a deadline for Debtor to notice parties of cure amounts. Debtor did not file the Cure Claim Schedule until November 24, 2014, which is less than the 10 days required in

the plan. This factor, together with the bar dates for claims based on rejection, which is contained in Section 5.05, creates multiple deadlines that apply to lease rejections. 11 U.S.C. § 365 sets forth the process for lease rejections and the required timing of that process. To the extent that the various deadlines in Sections 5.05 and 5.08 conflict with the requirements of § 365 and are without the consent of the affected parties, the UST asserts that the provisions of § 365 apply and not the Amended Plan.

7. Sections 6.02 and 8.07 of the Amended Plan references “Exculpated Parties” and releases, but those parties are not identified. Instead “Exculpated Parties” include a list of unidentified persons in Section 1.01.41. The UST believes these provisions are similar to the third party releases objected to above, and the UST objects to these provisions as well.

8. Section 2.14 sets forth the payment date for claims that are paid by Debtor. Similar information should be provided with respect to the claims that will be paid by the Trust. This information is not provided in the specific plan treatment descriptions for the classes that will be paid by the Trust either.

9. The UST conditionally objects to the Amended Plan in that it does not meet the absolute priority requirement of § 1129(b)(2)(B)(ii) if a senior class of creditors does not vote to accept the Amended Plan. With respect to Section 10.02, the Amended Plan proposes that a guarantee of Debtor’s new debt is “new value” sufficient to overcome any absolute priority dispute. In the event that senior classes of creditors do not vote in favor of the Amended Plan, the Court must determine to what extent guarantees provide property of a value equal to the allowed amount of such claim as required by 11 U.S.C. § 1129(b)(2).

10. Section 10.04.02 provides general information about the GUC Trust. As objected to above, the estimated timing of distributions from the Trust should be described. In the

alternative, the Trust Agreement should set forth specific distribution triggers and rights and remedies in the event of a default.

11. Section 12.04.02 describes reporting requirements required by Debtor required pursuant to 28 U.S.C. § 1930. No matching provision is included for the Trust. The Amended Plan should clarify whether Debtor will be receiving information from the Trust to include in its reports or whether the Trust will be filing its own reports.

12. Article XV, Section 15.01, should include applicable bankruptcy law as well as applicable non-bankruptcy contract law under remedies for a default, given the long time between the possible confirmation hearing and the Effective Date. Also, the Trust Agreement provides that the Bankruptcy Court shall enter an order relieving and discharging the Trustee, which will necessarily require the consideration of applicable bankruptcy law.

13. Article XV, Section 15.01 requires creditors alleging a default under the Plan to give Debtor notice of such default. There is not a similar remedy for a default for creditors whose claim is transferred to the Trust. The Amended Plan should clarify the remedies those creditors have.

WHEREFORE, PREMISES CONSIDERED, the UST prays that confirmation of the Amended Plan be denied and for such further and other relief as is just.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I forwarded a true and correct copy of the foregoing United States Trustee's Objection to Amended Plan by electronic means for all Pacer system participants and to the parties listed on Debtor's Mailing Matrix, attached to the filed Objection, and mailed to the party listed below on this the 1st day of December, 2014.

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